United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-7128

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JUAN SANCHEZ LUGO,

Plaintiff-Appellant,

against

THE EMPLOYEES RETIREMENT FUND OF THE ILLUMINATION PRODUCTS INDUSTRY, CHARLES F. ROTH, individually and in his capacity as Assistant Executive Secretary of the Employees Retirement Fund of the Illumination Products Industry, and KENNETH CEPPOS, SIMON GRAFSTEIN, LEONARD GOLUB, HANNIBAL IMBRO, JOHN H. KLIEGL, II, EDWARD R. MURPHY, JERRY SCHNEIT, ROWLAND J. SIMES, MEYER TEITELBAUM, WALTER WEISS, ALBERT BAUER, SOL BERMAN, JOSEPH BONO, STEPHEN KANYOOSKY, KAREL MRNKA, JOHN SCIACCA, LOUIS STEIN, THOMAS VAN ARSDALE, HARRY VAN ARSDALE, JR., and SANTOS ZAPPATA, as trustees of the Employees Retirement Fund of the Illumination Products Industry,

Defendants-Appellees.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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Opinion Below

District Judge John R. Bartels' opinion and order dismissing the complaint dated January 17, 1975 (n.o.r.) is set forth on pages A396-410 of the Joint Appendix.

Jurisdiction

The plaintiff asked the District Court to take jurisdiction under § 302 of the Taft-Hartley Act, 29 U.S.C. § 186, which prohibits payments by employers to employee representatives except, *inter alia,* where such payments are made to trust funds established "for the sole and exclusive benefit of the employees of such employer".

The defendants moved to dismiss for lack of jurisdiction on the ground that the plaintiff did not allege in his complaint that the trust was established for the benefit of any person other than the employees.

Judge Bartels denied the defendants' motion to dismiss and took jurisdiction under § 302(e) to determine whether the provisions of the Agreement here challenged constitute structural defects in violation of § 302(c)(5) of the Act. *Lugo* v. *Employees Retirement Fund of the Illumination Products Industry,* 366 F.Supp. 99 (E.D.N.Y., 1973) (A15-19).

After trial, Judge Bartels found that the plaintiff failed to establish such structural defects and he declined to take pendant jurisdiction over plaintiff's claims under state law. Judge Bartels now appears to have adopted the defendants' view of the strictly limited scope of Federal Court jurisdiction of § 302 matters.

The Federal Courts have no jurisdiction of this case because the plaintiff has neither alleged nor proved that any challenged provision of the Trust Agreement constitutes a structural defect pursuant to which the Trust Agreement provides for payments to anyone other than employees.

Questions Presented

1. Whether the Federal Courts have jurisdiction of this case.

2. Whether the plaintiff was deprived of due process.

3. Whether the plaintiff has standing to sue for a judgment relating to his eligibility for a standard pension.

Statute Involved

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

* * *

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) . . .

* * *

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, . . .

Statement of Facts

Juan Sanchez Lugo, a former participant in the Employees Retirement Fund of the Illumination Products Industry, complaining of the defendants' refusal to grant him a disability pension, seeks:

1. A declaratory judgment that the defendants' refusal to award him a disability pension was unlawful and void;

2. A judgment requiring defendants to give him a full hearing with respect to his claim for a disability pension and a right to judicial review of its decision;

3. Money damages;

4. An order requiring the Trustees to change the eligibility requirements for its standard pension so that he might in the future become eligible therefor.

The plaintiff at age 51 quit his job as metal worker in April, 1972, allegedly because he considered himself disabled by "eye trouble". He refused the request of his employer and his union steward that he return to work (A283). Plaintiff's counsel did not contend or seek to prove that the plaintiff was in fact disabled, but only that he had "a good faith belief that he could no longer perform that job" (A267-268).

The plaintiff never asked the defendant trustees for a hearing prior to the filing of his complaint in this law suit (A312, 332-334).

The Trust Agreement does not accord applicants the right to a hearing and provides that the Trustees' decisions arrived at in good faith are final and not reviewable.

After he quit his job the plaintiff, pursuant to demand of the Welfare Department, regularly sought work at the offices of the New York State Department of Labor between April and September of 1972, as a power press operator (A283, 301-302). Thereafter the plaintiff went to Puerto Rico to take care of his elderly ailing parents, and he resided in Puerto Rico and looked for work as a pump press operator, but found no work (A295-297, 304, 315).

The plaintiff applied to the United States Social Security Administration for disability insurance. His application was rejected, which rejection was upheld by an Administrative Law Judge and by the Appeals Council of the Department of Health, Education and Welfare (A307-313).

ARGUMENT

The Federal Courts lack jurisdiction of the subject matter.

Last year this Court considered the question of whether § 302(c)(5) of the Taft-Hartley Act conferred subject matter jurisdiction upon the Federal courts, and expressed no opinion, but affirmed Judge Tyler's dismissal of the complaint for want of subject matter jurisdiction on account of the unsubstantiality of plaintiff's case on the merits. *DeLoraine* v. *MEBA Pension Trust,* 499 F. 2d 49 at p. 51, Footnote 9, cert. den. U.S. Sup. Ct. No. 74-265.

In Judge Tyler's well-reasoned opinion, he stated:

> ". . . Furthermore, as a matter of common sense, it seems hardly likely that Congress intended to back into the creation of a federal law of pension trusts by means of a fifth exception to a general prohibition on payments to the representatives of employees." 355 F. Supp. 89 at p. , Footnote 5.

This Court in *DeLoraine* did not adopt Judge Tyler's view that he lacked subject matter jurisdiction of Taft-Hartley Pension Trusts, and cited, *inter alia,* Judge Bartels' Decision denying the motion to dismiss the complaint of the plaintiff herein. *Lugo* v. *Employees Retirement Fund,* 366 F. Supp. 99, E.D.N.Y. 1973. Judge Bartels' then tentative acceptance of jurisdiction of Lugo's complaint was based upon his then-held erroneous belief that the Taft-Hartley Act's requirement that defendant trust fund be used "for the sole and exclusive benefit of the employees" meant that such fund be administered for the benefit of "all" of the employees.[1] Both the plain meaning of the words "sole and exclusive" and the rationale of § 302(c)

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[1] The word "all" is omitted from the quotation from Judge Bartels' opinion set forth in appellant's Brief at page 11 (A19).

(5), as discussed by Judge Tyler, in *DeLoraine,* make it clear that this section was enacted to provide that the trust funds covered therein must not grant benefits to any one *other than* employees—not that these trust funds must treat equally every single employee or every class of employee.[2] Judge Bartels has now adopted Judge Tyler's view and declined to take jurisdiction herein (A344-347, 404-407).

Appellant's citation (Brief, pp. 8, 11-13) of *Pete* v. *U.M.W.,* —— F.2d —— (D.C. Cir., 1975), Docket No. 73-1270, 2/12/75; 29 BNA. Pension Rptr. D-1, 2/25/75; *Roark* v. *Lewis,* 401 F.2d 425 (D.C. Cir., 1969) and *Sturgill* v. *Lewis,* 372 F.2d 400, 401 (D.C. Cir., 1966) is inapposite, apart from the failure of these decisions to set forth whether the Court was acting pursuant to its Federal jurisdiction.

The District of Columbia Circuit in *Sturgill* vacated the District Court's judgment of dismissal of the miner's application for pension and remanded the case with instructions to remand it to the Trustees, only because the District Court had tried the case *de novo* on a factual issue not presented in the Administrative Record before the Court. The District of Columbia Circuit added a dictum which stated that the Trustees should employ proceedings which "conform to at least elemental requirements of fairness", failing which the Court of Appeals might reconsider its ruling in *Danti* v. *Lewis,* 312 F.2d 345, that a District Court's only duty was to determine whether the material before the Trustees was sufficient to support their decision. In sum, procedural due process requirements have yet to be imposed upon pension fund trustees in the District of Columbia.

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[2] Were a pension trust improperly to discriminate against any class of employees because of age, sex, race, etc., prohibition of such discrimination would be covered by other Federal statutes of which plaintiff's attorneys are cognizant.

The District of Columbia Circuit in *Sturgill* added that the Trustees also had a duty "to future applicants as well whose pension rights may be jeopardized by depletion of the fund through improper disposition thereof. . . ."

In *Roark,* the District of Columbia Circuit, remanding the judgment of the District Court for further consideration of the reasonableness of a requirement that applicants for pension must have served their last regular employment with a contributing employer, *inter alia,* stated:

> "We recognize that by their very nature most eligibility requirements established in this type of trust are colored to greater or lesser degree by an element of arbitrariness. . . ."
>
> "The court is fully cognizant of the internal pressures exerted on the trustees: the size of the pie is fixed and variations can be achieved only by changing the size or the number of the slices. There is no camouflaged design on the part of the court to second-guess the discretionary judgments of the trustees, nor should we be read as attributing a contractual right to a pension to potential beneficiaries who have been employed by signatory operators. We do say that . . . the burden is on the trustees to show some rational nexus between the Fund's purpose and the [eligibility] requirement. If such a nexus is shown the court's scrutiny is at an end. It is for the trustees, not judges, to choose between various reasonable alternatives (citing case)."

In *Pete,* the District of Columbia Circuit invalidated a structural eligibility requirement (signatory last year employment provision) of the Mine Workers' Trust Agreement and affirmed the portions of the District Courts' order granting pension benefits to applicants who had reached retirement age retroactive to the time of denial of each application for retirement.

This Court should hold that it lacks subject matter jurisdiction under § 302(c)(5) to review a trust fund's procedures used to ascertain whether an applicant for disability pension is or is not disabled.

Plaintiff was not deprived of due process.

Assuming *arguendo* that the District Court did have jurisdiction, the plaintiff was not deprived of any rights to his prejudice.

In support of his application for disability pension, the plaintiff submitted two letters from his own physician, Doctor Simpson, neither of which states that the plaintiff is disabled, either totally or partially, either permanently or temporarily, either from engaging in his most recent occupation or in any other occupation.

The plaintiff was carefully examined by a panel of the Fund's physicians and was found not to be disabled. If defendant's physicians were required to make themselves available for cross-examination whenever they found an applicant for pension not to be disabled, the defendant either would be required to employ fewer physicians to examine each applicant, since physicians' time is expensive, or would unnecessarily deplete the corpus of the Trust. As the United States Supreme Court speaking through Mr. Justice Douglas held in *Richardson* v. *Perales*, 402 U.S. 389 at 406, written reports of Social Security Administration physicians suffice to support a finding of non-disability, in order to prevent "a substantial drain on the trust funds and on the energy of physicians already in short supply".

If the plaintiff's physician had claimed that the plaintiff was totally and permanently disabled and were denied an opportunity to testify to that fact, such refusal might have presented a due process question to this Court were this

Court to exercise jurisdiction. Since the plaintiff's physician has not contended that the plaintiff is disabled, that issue is moot.

A requirement of a hearing for every applicant who claimed to be disabled would be analogous to a requirement that every litigant who files a frivolous action in court is entitled to a trial by jury. Every fund must be given the discretion to dispose of claims in a manner consistent with their merits, just as every court has the right to dismiss actions pursuant to motions where appropriate.

If the United States Department of Labor in connection with its administration of the Employee Retirement Income Security Act of 1974 (ERISA) adopts regulations which require hearings, such regulations will, of course, be presumptively binding upon the defendants. Unless and until such requirements are promulgated, this Court should not promulgate such requirements.

The plaintiff lacks standing to sue for a judgment relating to his eligibility for a standard pension.

The plaintiff left the Illumination Products Industry at age fifty-one. Under this Industry's standard pension plan, an employee may not elect to retire until age sixty. Judge Bartels' ruling during the trial were consistent with the position that Lugo lacked standing to sue with respect to his inability to become eligible for a standard pension (A248-253).

No Federal Court, we believe, has addressed itself to the alleged inadequacy of a pension plan on behalf of a litigant who had not reached that plan's retirement age. (See *Pete,* cited *supra,* p. 8.) Were this Court to do so on behalf of a man of fifty-one, then why not a man of thirty-one?

CONCLUSION

The judgment of the District Court below is correct and should be affirmed.

Dated: New York, New York, July 29th, 1975.

Respectfully submitted,

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375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LUGO

VS

THE EMPLOYEES RETIREMENT FUND, ET AL

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

ROBERT FORD being duly sworn,

deposes and says that he is over the age of 21 years and resides at 755 Hancock st Brooklyn, n.y.

That on the 29th day of July, 1975 19 at

he served the annexed BRIEF OF THE APPELLEES upon

Legal Services for the Eldery Poor, 2095 Broadway, N.Y, N.Y.
in this action, by delivering to and leaving with said attorneys for the plaintiff-appellant

~~xxxx~~ TWO true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 29th

day of JULY, L 1975 19

Robert L. Ford

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977